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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 698

WADE H. COOPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Wade H. Cooper prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above numbered cause on October 25, 1956, affirming the judgment of the Court below, a judgment of the District Court of the United States for the District of Columbia, on October 21, 1955, in favor of Respondent. A

NOTE: For definitions of words and phrases please see note on page 1 in brief for Appellant and joint appendix.

rehearing *en banc* was denied by said Court of Appeals on Nov. 26, 1956, Judges Prettyman and Fahy not participating.

Petitioner represents:

1. That the said District Court (Judge Holtzoff) did not deliver any opinion in the case, but simply granted the "Amended Motion" of Respondent on October 21, 1955, without notice to and in the absence of Petitioner.

2. That the opinion of the D. C. Court of Appeals of October 25, 1956, has not yet been officially reported and a copy is appended hereto at page 12.

Jurisdiction:

3. The District Court derived jurisdiction under Sec. 1346, Title 28, Federal Code Annotated.

4. The D. C. Court of Appeals derived jurisdiction from Sec. 1291, Title 28, page 4183, U. S. Code of 1952, and other lawful authority prior thereto.

5. The Supreme Court derived jurisdiction from Title 28 (Judicial Code and Judiciary) Sec. 347, Code of Laws of the United States of 1935, page 1272. (Sec. 240 Judicial Code amended.)

Questions Presented

1. Was, and is it lawful for any of the lower Courts or the Tax Court or the Court of Appeals (CCA4) to base their opinions or judgments upon points never put in issue in the pleadings or at the trial or hearing?

2. Was, and is it lawful for the Respondent to file an answer without permission of the Court at any time three months or 85 days late or out of time 85 days, as in the instant case?

3. Was, and is it lawful for the District Court (Judge Holtzoff) to grant an "Amended Motion" at any time without notice to Petitioner, as a party to the suit, of the date of the hearing, and, also, without notice of the granting of the same, as in the instant case?

4. Was, and is it a violation of the due process clause of the Fifth Amendment of the Constitution for the District Court to enter an order dismissing the bill of Petitioner without giving him notice of the date of the hearing, as in the instant case?

5. Does *res judicata* or collateral estoppel apply to a new question, a new cause of action never before in issue, as in the first amendment claiming $7,433.68 as return of capital?

6. Was the Savings Bank fraudulently closed?

7. If the order of the Court of Appeals of 1936 is finally declared fraudulent and not binding (the order holding the Savings Bank insolvent) does the affirmation order of the Court of Appeals (CCA 4) still remain in force and effect, regardless of the fact that the order of 1936, (upon which it was based) is declared fraudulent and not binding? An answer to this question will (it seems) determine the fate of the dismissal order of the D. C. Court of Appeals on October 25, 1956.

8. Was the D. C. Court of Appeals legally correct in dismissing the Bill of Complaint on Oct. 25, 1956, in view of the law and the facts? Petitioner thinks the record abundantly showed that this question should be answered in the negative—

Rules and Laws Involved

1. *Points not in issue.*

> • • • "Recognition of this general principle has caused this Court to say on a number of occasions that the Reviewing Court should pass by without decision questions which were not urged before the Board of Tax Appeals". Hormel vs. Helvering, 312 U. S. 566 (1940).

2. *The Answer.*

The answer of the Government was not filed until 85 days late or out of time 85 days contrary to the Rules (JA 44(a)) Rules are derived from the Law.

3. *No Notice.*

Petitioner never received any notice whatever at any time of the date of the alleged hearing of Oct. 21, 1955, or the granting of the "Amended Motion". (Affidavit of Petitioner JA 47) (Rule 56(c)). Such conduct is referred to by the Supreme Court as a "mockery" and a "fraud" in Windsor vs. McVeigh, 93 U. S. 281 (1876), where, with approval, Judge Story is quoted by the Supreme Court as referring to such an order as a "solemn fraud" and as to such orders "as mere Mockeries and as in no just sense judicial proceedings" and they "ought to be deemed as mere arbitrary edicts or substantial frauds".

4. *Fifth Amendment.*

The due process clause is in the Fifth Amendment found in the Constitution in the Code of Laws of 1935 or any other U. S. Code.

5. *Return of Capital.*

"mere Capital" is entirely free from taxation. Penn Road Corp. vs. Commissioner, Tax Court Vol. 21, page 1098

(1954). And also regulation 111 Sec. 29, 21(a). A mere "return of capital" is entirely free from taxation.

Rules of Civil Procedure 10(b):

> • • • Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matter set forth. And see Rule 8(f) page 11.

6. Fraud.

See paragraph 6 "Why the Writ should be granted" showing various fraudulent acts.

7. Unclean Hands:

> "But the objection that the Plaintiff comes with unclean hands will be taken by the Court itself".
>
> "Decency, security and Liberty alike demand that Government officials be subjected to the same rules of conduct as are commands to the citizen", • • •
>
> "The maxim of unclean hands comes from Courts of Equity. But the principle prevails also in Courts of Law. Its common application is in civil actions between private parties. When the Government (as here) is the actor, the reasons for applying it are even more persuasive."
>
> • • • "It is invoked in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination." Mr. Justice Brandeis in Olmstead vs. United States, 277 U. S. 484, 485.

8. Status Quo.

The Supreme Court has authority to restore the *Status Quo* regardless of the action of the Court of Appeals or any member of that Court.

> "After a defendant has been notified of the pendency of a suit seeking an injunction against him, he acts at

his peril and is subject to the power of the Court to restore the "*Status Quo.*" English vs. Devine, D. C. Mass. (1945) (59 Fed. Supp. 379).

This applies to all the Judges of the Court of Appeals, as they were "in active concert or participation with them who received actual notice." Regal Knitcaen Co. vs. N. L. R. B., 324 U. S. 1-9.

Statement of the case

1. This case had its origin in the Tax Court, involving firstly, the gains on certain assignments in settlement of the matter of interest with certain depositors of the Savings Bank in question following the payment of 100 per cent principal (not pertinent here). And secondly, the claim of Petitioner of a refund of around $17,000.00 growing out of a stock loss of $352,800. in 1945, as the result of the wrongful liquidation of the solvent Savings Bank, which paid 100 per cent promptly and later 10 per cent interest.

2. The fundamental question in the Tax Court was the year of the loss. The Tax Court (one Judge) held that the loss was sustained in 1936, when the D. C. Court of Appeals held that the Savings Bank was insolvent, or the year 1937 when the Receiver of the Bank sued the Stockholders for an assessment, both prior to the year 1941, the year the carry over law was passed, and under which Petitioner sought to carry over his loss of $352,800.00, sustained, he claimed in the year 1945. The Court of Appeals (CCA 4) affirmed the holding of the Tax Court.

3. The years 1936 and 1937 were never mentioned in the pleadings or at the trial in the Tax Court and were injected in the reply brief of Respondent sixty days subsequent to the trial of the case, contrary to the law as laid down by the Supreme Court. (312 U. S. 566.) There-

fore, upon affirmation by the Court of Appeals (CCA 4) Petitioner filed a complaint to have the order of the D. C. Court of Appeals in 1936 holding the Bank insolvent declared fraudulent (JA 1, 10) and not binding on the District Court (JA 10).

4. The Respondent was 85 days late in filing his answer *without permission of the Court at any time.* And Petitioner never at any time received any notice of the alleged hearing on Oct. 21, 1955, or any notice of the granting of the motion (see JA 47 affidavit of Petitioner).

5. In addition to claiming a carry over loss under Sec. 117 (e) Petitioner filed an amendment, claiming the assignment gains were restored capital (JA 29 last paragraph).

6. The District Court at a hearing on October 5, 1955, sustained the plea of *res judicata*, but the order was never entered, and on Oct. 18th the "Amended Motion" was filed, and on Oct. 21, 1955, an order was entered granting the "Amended Motion", without notice or knowledge of Petitioner, from which order Petitioner appealed to the D. C. Court of Appeals. The Court of Appeals on Oct. 25, 1956, sustained the District Court, upon the ground that the order of the Court of Appeals (CCA 4) was *res judicata* as to 1946, and applied collateral estoppel as to the other years. This was like saying that the order of the D. C. Court of Appeals in 1936, now under attack for fraud, was *res judicata* and beyond attack, as the order of the Court of Appeals (CCA 4) falls if and when the order of 1936 falls.

Why the Writ should be granted

1. The record shows that neither the year 1936 nor the year 1937 were ever put in issue, in the pleadings or at the hearing, in the Tax Court and not until 60 days fol-

lowing the hearing when these two years were injected into the reply brief of the Government (JA 41, 42, 45, 49). The Supreme Court has repeatedly held:

> "That the Reviewing Court should pass without decision questions which were not urged before the Board of Tax Appeals." See Hormel vs. Helvering, 312 U. S. 566.

2. The record shows that the answer of the Government was filed out of time about three months (85 days) without permissio. of the Court, and following a motion for permission, which was never granted (JA 26, 27). It appears that the printer only printed a part of the proposed order never granted (top of page 26 JA). If the Government could delay its answer 85 days without permission, why not 850 days. Rules are made to be observed and enforced.

3. Petitioner never at any time received any notice of a date set for the hearing of the "Amended Motion" and never received any notice of the granting of same on Oct. 21, 1955, until so informed by Judge Tamm in open Court on Dec. 8, 1955. (See affidavit of Petitioner JA 47.) The Supreme Court has said that such conduct is a "mockery" and a "fraud". And as the case was decided upon points never put in issue as stated in paragraph 1, which was also without notice, until 60 days after the hearing, such conduct also is characterized by the Supreme Court as a "mockery" and a "fraud". 93 U. S. page 281 (1876), where, with approval, Judge Story is quoted by the Supreme Court as referring to such an order as a "solemn fraud" and as to such orders "as mere mockeries and as in no just sense judicial proceedings" and "they ought to be deemed as mere arbitrary edicts or substantial frauds". In such cases Petitioner respectfully submits that the time of our Courts should not be wasted on such

proceedings but the offending Court or Judge should be required to obey the law and the facts or enjoined from any further action in such a case, as his discretion or power is abused and arbitrary and without justification.

4. Failure to give a party notice does violence to the due process clause of the Fifth Amendment of the Constitution of the United States. Our Supreme Court characterized such misconduct as a "mockery" and a "fraud", as already shown.

5. The first amendment of the original complaint (JA 29, bottom of page) a paragraph (should be 14) specifically claims that the $7,433.86 gains made in the calendar year 1945, were the return of capital, entirely free from taxation, according to Regulation III Sec. 29-21 (a). This is in addition to the carry over claim, both permissible under the Rules (See Rule 10 (b)) but utterly disregarded by both the lower Courts.

6. The closing of the Bank was fraudulent as the record shows (See affidavits of Col. Fowler, Mr. Rolland Nutt, Mr. Spencer Fitzgerald (JA 15, 16, 17), Col. Fowler stating that the former Comptroller offered to open the Bank for him if he would secure Petitioner's stock; Mr. Nutt, Deputy Receiver of the Bank, stating that he and the Receiver, Mr. Keene (deceased) refused to sue the stockholders, as they found the Bank solvent, following which they resigned by request; and Mr. Fitzgerald stating that the bank building was not sold until 1944-45.)

7. Fraud destroys everything, including all orders based upon the original fraudulent order, as the D. C. Court of Appeal's order of 1936 in the instant case. Courts will not or should not contaminate themselves by relying upon fraudulent orders, as in the instant case.

> "But the objection that the Plaintiff comes with unclean hands will be taken by the Court itself".
>
> • • • "It is invoked in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination." Mr. Justice Brandeis in Olmstead vs. United States, 277 U. S. 484, 485.

It is not necessary to take any action regarding the Court of Appeals (CCA 4) as the D. C. Court of Appeals has the authority to declare fraudulent the 1936 order, but in any event the Court of Appeals (CCA 4) would disregard its former holding as stated in the foregoing, or be ordered to do so by the Supreme Court if necessary.

8. The Supreme Court has authority to restore the *Status Quo* regardless of the action of the Court of Appeals or any member of that Court.

> "After a defendant has been notified of the pendency of a suit seeking an injunction against him, he acts at his peril and is subject to the power of the Court to restore the *Status Quo*." English vs. Devine, D. C. Mass. (1945) (59 Fed. Sup. 379).

This applies to all the Judges of the Court of Appeals, as they were "inactive concert or participation with them who received actual notice". Regal Knitwear Co. vs. N. L. R. B., 324 U. S. 1-9.

9. The Record shows that the D. C. Court of Appeals has sanctioned the action of the lower Court in disregarding the Rules, the Law, the Facts, and the Constitution as shown above.

10. Petitioner respectfully urges Mr. Justice Frankfurter, Mr. Justice Reed and Mr. Justice Black to refrain from participating in this case, as all three of them refused to grant certiorari, unless Petitioner is mistaken, in the case where Petitioner sued for conspiracy to wreck the

Bank, thereby approving the lower Court holding that all officers of the Government are immune, so long as they act within the scope of their authority, clearly meaning that a conspiracy to wreck and destroy was "in the scope of authority", a paradoxical situation. They also refused to grant certiorari where the lower Court required the Bank to pay 6 per cent interest following the payment of 100 per cent principal, both holdings contrary to Law.

For the foregoing reasons Petitioner Prays that this petition for a Writ of Certiorari be granted.

January 14th, 1957.

Respectfully submitted,

WADE H. COOPER *Pro se.*,
University Club,
Washington, D. C.

Judgment of Affirmance

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,186

WADE H. COOPER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Columbia

Decided October 25, 1956.

Mr. Wade H. Cooper, appellant, *pro se*.

Mr. Charles B. E. Freeman, Attorney, Department of Justice, of the bar of the Supreme Judicial Court of Massachusetts, *pro hac vice*, by special leave of Court, with whom Mr. Charles K. Rice, Assistant Attorney General, Mr. Lee A. Jackson, Attorney, Department of Justice, Mr. Oliver Gasch, United States Attorney, Mr. Lewis Carroll and Mrs. Kitty Blair Frank, Assistant United States Attorneys, were on the brief, for appellee. Mr. Harold H. Greene, Assistant United States Attorney, also entered an appearance for appellee.

Before Bazelon, Fahy and Bastian, Circuit Judges.

Per Curiam: The primary question in this suit for refund of federal income taxes for the years 1946 through

1950 relates to appellant's allegation that certain bank stock became worthless in 1945 and that he is therefore entitled to apply the five-year loss carry-over provision of Section 117(e) of the Internal Revenue Code of 1939, 26 U. S. 117(e) (1952 ed.), which became effective December 31, 1941. But in a prior proceeding, commenced by this appellant's Tax Court petition for redetermination of 1946 taxes, the Court of Appeals for the Fourth Circuit held that the bank stock became worthless before December 31, 1941. (Cooper vs. Comm'r, 209 F. 2d 154 (4th Cir. 1954.) Upon that holding the carry-over provision is inapplicable. The present claims are therefore barred: that for 1946 as *res judicata*, Comm'r v. Sunnen, 333 U. S. 591, 597 (1948); those for 1947 through 1950 by collateral estoppel. Tait v. Western Maryland R. Co., 289 U. S. 620 (1933).

With respect to other matters urged by appellant we find no error affecting substantial rights. The summary judgment below in favor of appellee is affirmed.